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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FORRISS D. ELLIOTT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether petitioner, an African-American, was deprived of his constitutional right to a fair trial and impartial jury representing a true cross-section of the community, in violation of the Sixth Amendment, and whether black prospective jurors were denied their constitutional right to serve on a jury, in violation of the Equal Protection Clause and the Fourteenth and Fifth Amendments, where the all-white jury which tried and convicted petitioner resulted from the trial Court's

A. granting the government's challenges for cause of three black prospective jurors who were not properly disqualified, without any *Batson*-type investigation of the racial reasons for such challenges, and

B. thereafter permitting the government to exercise peremptory challenges against the three remaining black prospective jurors, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986),

thereby removing all black persons and achieving an all-white jury to try petitioner.

II.

Whether purely intrastate mailings and activities can support a mail fraud conviction under 18 U.S.C. Section 1341, including whether *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995) is applicable to clauses of Article I, Section 8 of the Constitution other than the Commerce Clause.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Forriss D. Elliott prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the judgment of the Court below affirming his conviction.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on July 22, 1996, in an opinion which is reported in *United States v. Elliott*, 89 F. 3d 1360 (8th Cir. 1996). The opinion is reproduced as Appendix A hereto.

Petitioner filed a petition for rehearing and a suggestion of appropriateness of rehearing en banc. On October 2, 1996, the Court of Appeals entered an order denying the suggestion for rehearing en banc and denying the petition for rehearing by the panel. This order has not been officially reported, and is reproduced as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 22, 1996. (See Appendix C.) Petitioner filed a timely petition for rehearing, which was denied on October 2, 1996. (See Appendix B.)

The jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves interpretations of Article I, Section 8, Clause 7 of the Constitution of the United States, and the Fifth, Sixth, and Fourteenth Amendments to the Constitution, and also involves an interpretation of 18 U.S.C. Section 1341. Pertinent portions thereof are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner Forriss D. Elliott, an African-American member of the Bar of the State of Missouri, was the only defendant named in an eight-count indictment returned by a federal grand jury on November 4, 1993; he was thereafter convicted on all counts.

The first seven counts charged that petitioner had been selected as a Special Assistant Attorney General of Missouri to defend claims against the Second Injury Fund, under a contract with the Division of Workers' Compensation of the State of Missouri, that petitioner devised a scheme to defraud the State by inflating his bills, and that on seven different occasions he caused bills to be deposited in the mail, all in violation of 18 U.S.C. Section 1341. The eighth count charged a conspiracy of petitioner and others, who were unnamed and not indicted, to commit the mail fraud offenses.

The government introduced numerous documentary exhibits consisting of petitioner's office file records, records of the Division of Workers' Compensation including specific files in which petitioner acted as attorney for the Second Injury Fund, and various bills submitted by petitioner's office. The files from petitioner's office had been seized by United States Postal Inspectors, pursuant to a search warrant issued by the District Court. In addition to the documentary evidence, there were several witnesses for the government, and petitioner offered witnesses and documents. Evidentiary issues were raised in the District Court and the Court of Appeals, but for the most part they are not relevant to a consideration of the issues presented by this petition. Although the evidence at two earlier jury trials resulted in hung juries, petitioner will accept, for purposes of this petition, the statement of facts contained in the Court of Appeals opinion (App. A). See *United States v. Elliott*, 89 F. 3d at 1362-1363 (part I) and 1367-1369 (part IV).

Petitioner's conviction was rendered in the third full trial of this case, all tried before the Hon. Jean C. Hamilton, District Judge for the Eastern District of Missouri. The first trial lasted from April 4 to April 15, 1994, when a mistrial was declared because the jury was unable to agree upon a verdict. Two members of that jury were black. The second trial lasted from October 12 to October 31, 1994. Again, the jury which had four black jurors was unable to agree upon a verdict, and a mistrial was declared. A third attempt at a trial on November 22, 1994, was aborted by a mistrial during the first day of jury selection, when reference was made to the fact that petitioner had been tried twice previously.

A week later, another jury was selected, but this time there were no blacks on the jury. The trial lasted from November 28 to December 9, 1994. Within a few hours after submission, the all-white jury found petitioner guilty on all eight counts. An issue is raised in this petition as to the procedure which resulted in an all-white jury trying petitioner, who is black. In the Argument portion of this petition, petitioner contends that black venirepersons were improperly challenged for cause by the government and were improperly stricken by the Court. In addition, petitioner argues that the three remaining black venirepersons were peremptorily challenged by the government, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

In addition to the jury composition issue, petitioner is also presenting an issue as to the use of the mail fraud statute (18 U.S.C. Section 1341) to support a conviction where the evidence showed that all mailings on which the prosecution relied were intrastate between two places within the State of Missouri. Petitioner contends that application of the mail fraud statute to an intrastate transaction is contrary to this Court's decision in *United States v. Lopez*, ___ U.S ___, 115 S.Ct. 1624, 131 L. Ed. 2d 626 (1995).

More detailed facts relating specifically to the Questions Presented for Review are included in the Argument portions of this petition.

The jury convicted petitioner on all eight counts, and he was sentenced on March 3, 1995, to a term of imprisonment for 60 months. Since April, 1995, he has been confined in the prison camp at the Federal Correctional Institution in Greenville, Illinois.

Petitioner duly filed his Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. On July 22, 1996, the judgment of conviction was affirmed. See *United States v. Elliott*, 89 F. 3d 1360 (8th Cir. 1996), reproduced as Appendix A hereto. On October 2, 1996, the Court of Appeals denied petitioner's petition for rehearing by the panel, and also denied petitioner's suggestion for rehearing en banc. See Appendix B hereto.

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming the conviction of petitioner, and presents questions of importance concerning the challenges for cause and peremptory challenges of black venirepersons which resulted in an all-white jury which convicted petitioner, and a constitutional issue as to the application of the mail fraud statute (18 U.S.C. Section 1341) to mailings not involving interstate activities, especially in the light of this Court's decision in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995).

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

I. The all-white jury

A. Introduction

Racial composition of a jury has been a subject of concern for many years. "In the many times we have confronted the issue . . ., we have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). The revival of the issue in *Batson v. Kentucky*, 476 U.S. 79 (1986), focused on discriminatory practices in the exercise of peremptory challenges, in violation of the equal protection guarantees of the Fourteenth and Fifth Amendments.

The racial discrimination in this case against petitioner, an African-American man, occurred not only in the prosecutor's exercise of peremptory challenges, but earlier by the assertion by the prosecutor, and allowance by the Court, of racially motivated challenges for cause. Indeed, the genesis of the error relates back to two earlier trials of petitioner.

B. Factual background

When the *Batson* issue as to peremptory challenges was first raised in the third and last trial, the prosecutor initially sought to foreclose any *Batson* inquiry by suggesting that he had a history of non-discrimination, as reflected in the fact that two earlier trials of petitioner had included black jurors. Apparently, the prosecutor sought to disregard *Batson's* rejection of the requirement of *Swain v. Alabama*, 380 U.S. 202 (1965), which had placed the burden on the defendant to demonstrate a prior standing practice of discrimination by the prosecutor. Thus, the prosecutor at the third trial revealed that in the first trial there were two black jurors and in the second trial there were four black jurors. The prosecutor was acutely aware of the fact that in

each of those trials, the racially mixed jury was unable to reach a verdict, and a mistrial was declared because of the hung jury.

Whereas the prosecutor was unable to secure an all-white jury in the first two trials, it appears that he commenced the third trial with the intention of using any means available to avoid black jurors, in violation not only of the Equal Protection Clause but of the Sixth Amendment right to an impartial jury. Armed at the third trial with a professional jury consultant and a jury list furnished by the Court, the prosecutor embarked on his journey to secure an all-white jury. He found a panel of 80 jurors, of whom 12 were black. The jury list gave background information on each juror, including residence, education, occupation, employment of the juror and spouse, children, and hobbies.

After some preliminary inquiries by the Court, the prosecutor spent 130 pages of intensive voir dire examination of the prospective jurors; petitioner's counsel only took 15 pages. At the conclusion of the voir dire examination, it was clear that the first 28 who had been questioned would not provide a sufficient number of available venirepersons because of several who would obviously be challenged for cause and the Court's desire to seat four alternates. Therefore, the first 45 panelists were potential jurors and alternates. Among the 45 were eight black persons.

The prosecutor and his consultants must have realized that with only six peremptory challenges (plus one for alternates), he would not be able to rid himself of all black jurors, unless he was able to strike some black venirepersons for cause. In addition, he knew that he could not use all of his six peremptory strikes against blacks without running afoul of *Batson*. The prosecutor therefore hoped that with some challenges of blacks for cause and with peremptory challenges of the small balance remaining, he could, within the framework of *Batson*, achieve his all-white jury. With the assistance of the Court's generous but erroneous

allowance of challenges for cause and sanction of peremptory challenges, that is exactly what happened. The rest is history. The Fifth, Sixth and Fourteenth Amendments notwithstanding, an all-white jury, in its ninth day of trial, deliberated for a few hours and found petitioner guilty on all counts.*

C. Challenges for cause

Of the first forty-five prospective jurors, eleven were stricken for cause, of whom four were black. Seven of the eleven were stricken for cause by agreement of the parties. Only one black was among the group stricken by agreement, because she had indicated that it was against her religious beliefs to sit on the jury. Petitioner objected to the prosecutor's successful challenge for cause of the other three black persons. Petitioner believes that the Court abused its discretion in striking these three blacks, and we will analyze each of these strikes and the qualifications of these prospective jurors hereafter. It should also be noted that, in connection with the successful challenges of these three blacks, the government also lodged challenges for cause, which were denied, as to two other black persons.

No. 3 - Carol Williams

The first prospective black juror stricken for cause at the request of the prosecutor was challenged because "she was the only juror who said that notwithstanding the fact that she knew that there was a search warrant involved, she would still be uncomfortable with the fact that there was an execution of a search warrant at the defendant's law office". It is true that Ms. Williams raised some questions about the search warrant, and when questioned further by the prosecutor, she said: "I am

* At the first trial the jury began deliberations on the eighth day of trial, and on the third day of deliberations, a mistrial was declared because of inability to reach a verdict. At the second trial, after eight days of trial, the jury began deliberating on the ninth day and continued for three days of deliberations. On the fourth day, a mistrial was declared because of inability to reach a verdict.

slightly uncomfortable with it, but I understand that that happens, so, yes, I am uncomfortable with it. . . . Although I understand the warrant is legal. If there's a warrant, I understand that." Later she was questioned by defense counsel:

> MR. CARTER: . . . Ms. Williams, I believe you also said, ma'am, that you had a problem with the fact of a search warrant here.
>
> VENIREMAN WILLIAMS: Yes, because I thought--I was under the impression that the officers went in when no one was there.
>
> MR. CARTER: Okay. As [Assistant United States Attorney] Mr. Martin has informed you, ma'am, there were some people there. Does that make any difference to you? Can you now look at the government's case, look at the defense's case on equal footing, giving preface [sic] to neither side?
>
> VENIREMAN WILLIAMS: I can do that. However, I would definitely do that anyway, though.

She was not questioned further concerning this alleged problem; obviously she had been completely rehabilitated by her answers and demonstrated without question that she could be a fair and impartial juror. If the prosecutor was unhappy with her, then he could have challenged her peremptorily, but having said without hesitancy that she could be a fair juror, giving preference to neither side, she was qualified and not subject to a challenge for cause. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The Court's striking of her, particularly in view of her race, was a manifest abuse of discretion.

No. 23 - Robert Coleman

Mr. Coleman was stricken for cause because allegedly he had a prior felony conviction and was therefore disqualified from sitting. See 28 U.S.C. Section 1865(b)(5). Despite the objection of defense counsel that there was nothing to show that he had a disqualifying conviction, the District Court said:

> Well, I'm going to tell you, we've got a lot of jurors, and that's one of the reasons I brought them in, but if there's anything close to a felony conviction, you're not going to get him on this jury, so I would grant that motion.

Without adequate proof of a disqualifying reason, the Court thus struck another black person from the panel.

Petitioner submits that the Court's action was precipitate and not based upon any record of a disqualification. The prosecutor was questioning venirepersons about prior arrests and Mr. Coleman acknowledged some prior problems. He was then asked if anything resulted in a conviction and answered: "I guess the stealing over 50. The stealing over 50 in 1966 was a felony. And I guess there was a conviction, but some paperwork from the court showed that it wasn't 'cause I was a minor when they came and got me, but by the time it was resolved I was eighteen." He then discussed another problem and was asked by the prosecutor if he would feel uncomfortable sitting on the jury and said: "No, not at all. By being in law enforcement, I go by the facts. Just give me the facts, and I'll look at that and make my decision." Thus, there was no proof that he had been convicted of a crime; the prosecutor's effort to disqualify another black venireperson was not based upon any disqualifying event, and in fact he affirmed that he could be fair. See *Irvin v. Dowd, supra.*

The other events in Mr. Coleman's background make it almost impossible (short of a sinister conspiracy) that he would have a conviction. Just two weeks earlier he had actually served on a

federal jury, and he was not disqualified then. In addition, his background included service as a military police officer, and a State correctional officer, and present service as a private security officer for the Board of Education; he had been employed by the Post Office, and he had participated or supervised in the execution of search warrants. It is inconceivable that a felon would have been involved in all of this law enforcement activity, probably authorizing him to carry a weapon.

Petitioner submits that the record is devoid of any legitimate reason to strike Mr. Coleman for cause. The phantom conviction was utilized by the prosecutor to reduce the number of blacks on the panel, and the Court, obviously not convinced that there was a felony conviction, erroneously sanctioned the unconstitutional challenge for cause.

No 38 - Lillie Robinson

The striking for cause of the third black at the request of the prosecutor was based upon some earlier "conversations about the guilt of this defendant and she also talked about that she thought the system was unfair to blacks". The defense pointed out that in these conversations she may have expressed the opinion that petitioner was guilty, which might ordinarily make her someone to be challenged by the defense, and further with reference to her feelings about the system of justice, she had stated that she could be fair; but the Court struck her for cause. After being reminded in the voir dire examination of the publicity over the involvement of the Attorney General of Missouri in the investigation, which resulted in separate indictments of petitioner, the Attorney General and others, Ms. Robinson recalled having seen a news spot concerning petitioner. She then recalled some discussion in the welfare office where she worked, where someone apparently expressed the opinion that petitioner was guilty, but she said that because of her particular work schedule she had not been deeply involved and did not "remem-

ber participating in any conversations in particular, but I have heard about him"; and she concluded as follows:

> MR. MARTIN [the prosecutor]: Okay. With what you've heard about him, then, the conversations in the office, would that cause you any difficulty in sitting on this jury?
>
> VENIREMAN ROBINSON: No.
>
> MR. MARTIN: Would you be able to put all that aside and consider just the evidence in this case?
>
> VENIREMAN ROBINSON: Yes.

Obviously, she clearly expressed an ability to be a fair and impartial juror, despite what she may have heard, and the first part of the prosecutor's challenge was not a justification to strike her for cause.

With reference to the criminal justice system, Ms. Robinson said: "I'm beginning to lean towards the idea that the more the money you got, the more status you have, the more people that you know, the better off you are in the legal system. If you're poor and you're black, sometimes the system don't seem to work for us." The prosecutor did not ask her if she could be fair, nor did he do so when he was again asking about the system and she stated, "I already stated my objection before." The defense, however, did have her consider that subject. After referring to money, influence, power, and O. J. Simpson, he asked her: "Can you, if selected to be members of this jury be a fair juror for this case, put your feelings about the court system outside? Can you, Ms. Robinson?" She answered: "Yes".

Thus, Ms. Robinson had all of the indicia of being a fair juror. Despite the fact that she, as well as other jurors, might have some misconceptions or opinions, she unequivocally stated that she could be fair if chosen to serve on the jury. See *Irvin v. Dowd*, *supra*. If the prosecutor disbelieved her, then he could have

stricken her peremptorily. His use of a challenge for cause, approved by the Court, leads only to the conclusion that he was attempting to clear away as many black jurors before he had to exercise his peremptory challenges.

No. 20 - Bernice Harper and No. 45 - Kelly Williams

The prosecutor's plan of action was also demonstrated by two other challenges for cause against black venirepersons. Although these challenges for cause were denied by the Court, they are indicative of the pattern of the prosecutor to try to cut down for cause as many black venirepersons as possible before he would be required to make his peremptory challenges. The first of these was Ms. Harper, to whom he came back after the others had sequentially been challenged for cause, apparently as an afterthought to attempt to get rid of another black after he had been so successful with his earlier challenges for cause. He accused her of mumbling and laughing with petitioner and his counsel. The Court said that might justify a peremptory strike and denied the challenge for cause.

In addition, the prosecutor made a challenge for cause as to the last black Kelly Williams, claiming that she might be moving with her Army husband. The Court denied the challenge for cause. It is interesting to note that when the time for peremptory challenges came, the prosecutor did not exercise one as to Ms. Williams, thus recognizing, we suggest, that there was no basis for his challenge for cause other than her race. (That he did not challenge her peremptorily and allowed her, a black person, to remain on the accepted jury, is not evidence that the prosecutor was race-neutral; by the time he decided to leave Ms. Kelly Williams on the jury, he knew that she was the fourth alternate and most unlikely to participate in the all-white jury deliberations. In fact, only the first alternate, a white person, was eventually called into service to replace another white juror.)

The end result of the prosecutor's activities concerning challenges for cause was that out of eight black jurors in the relevant group, he was able to have four removed for cause (one by agreement), thereby reducing the number of blacks for the exercise of his six peremptory challenges to four (but actually three because he did not peremptorily challenge Kelly Williams). Therefore he could get rid of the rest by peremptory challenges and end up with an all-white jury.

The Court's improper granting of three challenges for cause avoided the dilemma that would have faced the prosecutor — either use all six of his allowed peremptory challenges against blacks and create an irrefutable case for a *Batson* violation or permit a black or two to remain on the jury and risk an acquittal or another hung jury. The Court's abuse of discretion in striking for cause Carol Williams, Robert Coleman, and Lillie Robinson removed the prosecutor from between the rock and the hard place.

The Court of Appeals refused to consider the factual background of this issue, stating (89 F. 3d at 1364-1365) that *Batson v. Kentucky* applies only to peremptory strikes and that the *Batson* framework does not apply to for-cause strikes; the test as to challenges for cause, according to the Court of Appeals, is the discretion of the trial Court, irrespective of the racial overtones. Petitioner recognizes that *Batson* is applicable to peremptory strikes, but we believe that there should be a procedure, whether according to *Batson* or some other doctrine, whereby challenges for cause based upon invidious racial grounds are subject to judicial review. If, as the opinion states, discretion of the trial Court is the sole test, even in the matter of racial challenges, then we respectfully suggest that the law should be reviewed by this Court.

In the past, courts have confronted various systems for obtaining prospective jurors which, because of inequities or discrimination in the selection process, have deprived defendants of a fair

cross-section of the community prior to voir dire examination, challenges for cause, and peremptory challenges. For example, the systematic exemption of women from jury service was condemned because it destroyed the fair cross-section required by the Sixth Amendment. *Duren v. Missouri*, 439 U.S. 357 (1979). Equally obnoxious is exclusion based upon racial discrimination, regardless of the method, for, as said in *Batson* (476 U.S. at 88), "the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" So long as the pool of prospective jurors has been properly chosen, it is not required, after appropriately executed challenges, that the actual petit jury be a fair cross-section. *Batson*, 476 U.S. 79 at fn. 6. The crucial test is that the fair cross-section pool not be altered by invidious challenges. The overriding consideration is "jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life. . . . [R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

This Court has articulated three tests to establish a violation of the fair cross-section requirement. As enunciated in *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Duren v. Missouri*, 439 U.S. at 364, 366, the third requirement is a showing that the underrepresentation is due to systematic exclusion of a group in the jury-selection process. In the instant case, the method of the prosecutor, sanctioned by the Court, was to challenge black venirepersons for cause. Petitioner suggests that it makes no difference whether members of a group are discriminatorily excluded by a jury commissioner or by a prosecutor's discriminatory challenges for cause. It was clearly error for the District Court to allow the three black prospective jurors to be so challenged.

We respectfully suggest that this Court should declare in this case an appropriate standard to be applied by the trial Court. Instead of being guided solely by its discretion, the trial Court should be governed, in challenges for cause with racial or other unconstitutional overtones, by a standard similar to that in *Batson* for peremptory challenges.

Application of such a standard by the District Court here would have revealed that petitioner made a prima facie showing that the potential jurors were challenged because of race. With the burden then shifting to the prosecutor to articulate a race-neutral explanation for the challenges, the District Court should have, under the circumstances of this case, decided that the explanations were not race-neutral but were part of a pattern of purposeful discrimination, with the reasons given being clearly pretextual to avoid the service of blacks on this jury.

This petition presents an opportunity to provide needed guidelines to examine racially motivated challenges for cause — a logical precursor for application of the *Batson* doctrine. Because of the lower courts' refusals to address the racial discrimination here, the opinion of the Court of Appeals is in conflict with *Taylor*, *Duren*, *Batson*, and *Powers*. We respectfully suggest that this important question of federal law should be settled by this Court.

D. Peremptory challenges

After the strikes for cause, the prosecutor was faced with the need to strike three prospective black jurors peremptorily, out of the six challenges available to him, in order to achieve his all-white jury. He proceeded to do so. When the defense raised a *Batson* objection, the prosecutor at first thought he could satisfy the Court by referring to the lack of a pattern of striking all blacks, as demonstrated in the first two trials. As previously noted, this pattern test from *Swain* was abolished by *Batson*. Therefore it was incumbent upon the prosecutor to show race-

neutral reasons for the peremptory challenges of these three prospective jurors. In each instance, it is clear that his explanations were pretextual; his purpose, successfully executed, was to rid the jury of all blacks.

No. 4 - Charnette Smith

The prosecutor's "significant" reason for this peremptory challenge was that her hobbies were church organizations, and he added that she did not own her own home, and she laughed and seemed interested in what defense counsel said during voir dire examination. We believe all of these explanations were pretextual.

As to the church hobby, the prosecutor also referred to striking a white person who had church as a hobby. (Quaere whether "church" reasons are as improper as race and gender challenges.) It is true that the jury list shows that Ms. Smith listed as her hobbies and activities "church organizations" and that the white person listed "church, girl scouts". This reason was a subterfuge because the prosecutor raised no question as to another white who worked for a Baptist Church School and whose husband has been a minister for six years; she also did "volunteer work", no doubt in church organizations. The prosecutor also did not strike another white whose hobbies were "sewing, Christian concerts", and still another white whose hobbies and activities included "preach part-time". The disparate treatment of all those involved in church work does not satisfy *Batson*, because "the government may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics, are also challenged." *Reynolds v. Benefield*, 931 F. 2d 506, 512 (8th Cir. 1991), *cert. den.*, 501 U.S. 1204 (1991), and the government must exercise "its challenges in a consistent manner." *United States v. Atkins*, 25 F. 3d 1401, 1406 (8th Cir. 1994), *cert. den.*, ___ U.S. ___, 115 S.Ct. 371, 130 L.Ed. 2d 322 (1994).

As to Ms. Smith not being a homeowner, the information available from the jury list states: "live with homeowners". The prosecutor also struck another black (No. 12 - Renee Johnson) and a white, both of whom "rent" according to the jury list. On the other hand, he did not strike three other whites, as to all of whom the jury list does not show whether they own or rent, and the prosecutor made no inquiry as to their situation; nor did he strike three other whites who have only been homeowners for three months, two months and one year, respectively. In addition the prosecutor did not peremptorily strike the final alternate, a black, Kelly Williams, who "live[s] with homeowners" — the same language as Ms. Smith. We believe the homeowner test, even if uniformly applied as it was not in this case, is not a legitimate reason for exercise of a peremptory challenge. It does not take sociological studies or data to know that the black community has a much lower percentage of homeowners than the white community and that such a "reason" is merely an excuse to avoid blacks on the jury.

With reference to Ms. Smith's alleged laughter with petitioner and his counsel, significantly there was no proof in the record except the prosecutor's statement. If he had had a complaint concerning a juror's activities in that regard, he should have called it to the Court's attention on the record at the time it was occurring, or he should have produced evidence to substantiate his explanation. To belatedly say that he saw a juror, who incidentally happens to be black, laughing provides another opportunity to present an uncorroborated race-neutral reason which cannot be contradicted. Compare *Reynolds v. Benefield, supra,* at 512-13, *United States v. Atkins,* * *supra,* at 1406, *United States v. Scott,* 26 F.3d 1458, 1466 (1994), *cert. den.* ___ U.S. ___, 115 S.Ct. 584, 130 L.Ed.2d 498 (1994), and *Davidson v. Harris,* * 30 F.3d 963, 966 (1994), *cert. den.* ___ U.S. ___, 115

* *United States v. Atkins* and *Davidson v. Harris* were both tried by the same District Judge who presided at the trials of petitioner herein.

S.Ct. 737, 130 L.Ed.2d 639 (1995), as to "negative body language", "facial expressions", "subjective judgments", and the necessity of developing a record. Compare *Marks v. Shell Oil Co.*, 895 F.2d 1128, fn.2 (6th Cir. 1990).

No. 12 - Renee Johnson

The prosecutor objected to Ms. Johnson because she was not a homeowner - see discussion above as to Ms. Smith on this subject. He also struck her because she had three relatives employed by the Postal Service and the government is unhappy with postal employees sitting on a jury involving postal inspectors. Further, he said that Ms. Johnson did not answer when asked whether the system of justice was fair, and he felt some hostility from her, which he acknowledged he alone felt.

With reference to the postal service objection, the prosecutor had developed that Ms. Johnson's three relatives were a brother-in-law and two nephews who were mail carriers, but she had not been asked by him as to the closeness of their relationship. He stated that he had stricken a white man with a family member who is a postal employee. However, he did not strike a white who has "a very close friend who is retired as a mail man", another white whose uncle is a retired letter carrier, and another white whose grandmother was a postmaster and whose brother "is a postmaster in a small town"; he had no peremptory challenge for the black alternate Kelly Williams, who had previously been challenged for cause unsuccessfully, whose mother is currently a mail clerk and who, herself, worked for the post office twice. Obviously, the prosecutor was not consistent in his challenges across the board; he made certain that he exercised the challenges for stated reasons as to the blacks and not as to whites similarly situated.

No. 20 - Bernice Harper

As mentioned above, the prosecutor sought to strike Ms. Harper for cause, but it was denied. His attempt to show that the

peremptory challenge was not because of her color was that her spouse was a postal clerk (see discussion above), that "she was mumbling derogatory remarks, heard by Postal Inspector Becky Powers", that she laughed with defense attorney Carter, that Postal Inspector Powers saw her smiling with petitioner, and that she also did not express an opinion as to whether or not the system was fair. As to those matters allegedly observed by the postal inspector, there was nothing in the record; if alleged personal observations are going to be a cause for a peremptory challenge, some record should be made at the time, rather than belatedly when there is no proof. If he was concerned that she did not respond to the question of whether the system of justice was fair, then he should have asked her about that. See discussion above as to the need for a record where the prosecutor's subjective judgments are offered. Two white persons did not respond as to the fairness of the system and they were not stricken by him; a third white person only responded concerning unhappiness over the child support system.

In the final analysis the explanations given by the prosecutor for exercise of the peremptory challenges against the three blacks whom he struck were not valid race-neutral reasons, substantiated by the record. Instead it is clear that where the reason applied to whites as well as blacks, the prosecutor made certain to use it against the black. Other reasons depended upon his own uncorroborated statements which, in view of the circumstances in this case, are suspect.

The Court of Appeals said in footnote 5 (89 F. 3d at 1366) that "our caselaw establishes that explanations of the sort offered by the prosecutor in this case are race-neutral", citing six of its decisions. Five of those cases arose from the Eastern District of Missouri in which the instant case was tried. This brings to mind the continuing concern, expressed by the Court of Appeals over ten years ago in *United States v. Norton*, 780 F. 2d 21, 23, fn. 3 (8th Cir. 1985), "about the number of appeals originating from

the Eastern District of Missouri raising the issue of the government's use of peremptory challenges to strike blacks from the jury. . . . This Court will continue to be watchful of the apparent practice of exclusion of blacks from juries in trials in the Eastern District of Missouri." See also concurring opinion and addendum of Judge Bright in *United States v. Wilson*, 816 F. 2d 421, 423 (8th Cir. 1987). To permit the generic types of peremptory challenge excuses here, in conjunction with what appears to be a renewed program of the prosecutors of the Eastern District of Missouri, thwarts the mandate of *Batson*. It reveals the pretextual nature of the reasons given and suggests the need for special attention on review of these revived prosecutorial practices.

The Court of Appeals also suggested (at p. 1367) that petitioner was barred from raising certain discriminatory practices for the first time on appeal. We believe that the District Judge was well aware of the problems after the challenges for cause, and yet she permitted the prosecutor to secure an all-white jury, hopefully programmed to convict where two prior mixed juries would not. Appellate review is appropriate under the plain error doctrine of Rule 52(b), F.R. Cr. P.

The allowance of the peremptory challenges of the three remaining black venirepersons available to sit on the jury here was a clear violation of *Batson*, not just as to one but as to all three. Petitioner did:

> "establish a prima facie case of purposeful discrimination . . . first [by showing] that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire member of the defendant's race. Second, the defendant [was] entitled to rely on the fact, . . . that peremptory challenges constitute a jury selection practice that permits discriminat[ion] . . . . Finally, the defendant . . . . . raise[d] an

> inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race . . . .
>
> "Once the defendant [made] a prima facie showing, the burden shift[ed] to the [prosecutor] to come forward with a neutral explanation for challenging black jurors. . . . The prosecutor [failed to] articulate a neutral explanation related to [this] case. . . . The trial court then [had] the duty to determine [that] the defendant [had] established purposeful discrimination."

Batson, 476 U.S. at 96-98. The District Court erred in allowing the prosecutor to exercise his peremptory challenges of prospective jurors so as to achieve an all-white jury to try petitioner.

In affirming the trial Court, with approval of the historically based actions of the District Court for the Eastern District of Missouri, the Court of Appeals has departed from the accepted and usual course of judicial proceedings governed by *Batson*. This petition for writ of certiorari should therefore be granted as to this Question.

* * * * *

The peremptory striking of the three blacks, to complete the exclusion of blacks which commenced with the improper challenges for cause, demonstrates without question that the principles of *Batson* were violated from beginning to end. The government realized that two prior mixed juries on the same evidence were unable to reach a verdict. The only way to secure a conviction, in the government's view, was to acquire an all-white jury. The process was orchestrated to exclude blacks so as to avoid another hung jury or an acquittal.

This combination of discriminatory strikes for cause and peremptory challenges by the prosecutor, with the approval of

the trial Court, resulted in a jury that was not a fair cross-section of the community, in violation of the Fifth, Sixth and Fourteenth Amendments.

II. Intrastate activities

Petitioner was convicted of several violations of the mail fraud statute, 18 U.S.C. Section 1341. The evidence showed uses of the mail, but none was interstate because all were to and from places in Missouri. The government claimed a scheme to defraud the State of Missouri, but neither alleged nor proved any interstate connection. Petitioner believes that in view of recent developments of the law with reference to the Commerce Clause (Article I, Section 8, Clause 3 of the Constitution of the United States), petitioner's convictions cannot stand.

In 1916 this Court rejected a constitutional objection to the then mail fraud statute. *Badders v. United States*, 240 U.S. 391 (1916). In 1987, this Court reexamined the mail fraud statute in *McNally v. United States*, 483 U.S. 350 (1987), and held that it did not apply to a scheme which aimed to deprive citizens of their intangible right to honest government without any connection to a deprivation of money or property.

This Court has revisited the issue of a requirement of a connection with interstate commerce and refused to apply the Gun-Free School Zones Act of 1990 where there was no nexus to interstate commerce. *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995). The detailed discussion in *Lopez* of the history and decisions concerning the Commerce Clause resulted in a limitation on the use of federal prosecution to control intrastate activities. Compare *United States v. Robertson*, ___ U.S. ___, 115 S.Ct. 1732, 131 L.Ed. 2d 714 (1995).

In *Lopez*, this Court recognized that "Congress may regulate the use of the channels of interstate commerce" and "is empow-

ered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; we believe that the mere fact that there may have been an incidental intrastate mailing of a document in the instant case is not sufficient to satisfy the third category of *Lopez* that Congress may "regulate those activities having a substantial relation to interstate commerce . . ., i.e., those activities that substantially affect interstate commerce" (115 S.Ct. at 1629-1630). *Lopez* concludes with an expression of unwillingness to hold "that there never will be a distinction between what is truly national and what is truly local" (115 S.Ct. at 1634). Thus, in *Lopez*, this Court in effect has adopted a "state's rights" position (see footnote 3 of *Lopez*) in making a distinction between interstate and intrastate activities.

The Court of Appeals distinguished *Lopez* here, on the ground that *Lopez* involves the Commerce Clause and the mail fraud statute here is based upon the power of Congress to "establish post offices and post roads" (Article I, Section 8, Clause 7). We believe that *Lopez* requires a review of the application of the mail fraud statute to a purely intrastate matter.

Petitioner acknowledges that *Lopez* relates to the Commerce Clause (Article I, Section 8, Clause 3), and that the mail fraud statute comes from the Postal Power in Article I, Section 8, Clause 7. However, we suggest that all of the Congressional powers in Article I, Section 8 focus on non-intrastate activities and that the *Lopez* doctrine bars federal regulation of intrastate activities not within the framework of the Congressional powers in all of Article I, Section 8.

Otherwise, the most minuscule activities involving "post offices and post roads", such as the theft of a stamp from a private individual, could become a federal offense. Likewise the theft of a small number of coins from an individual could become a

federal offense under Article I, Section 8, Clause 5. Could a fight in a neighborhood tavern between a civilian and a soldier or sailor become a federal offense under Article I, Section 8, Clauses 12, 13 and 14? We believe that *Lopez* says these acts are not subject to federal prosecution.

The Court of Appeals should not have limited *Lopez* to the Commerce Clause. Instead we believe that *Lopez* reveals this Court's desire not to inject federal jurisdiction into local matters. As said in *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2nd Cir. 1995):

> "And the Supreme Court's decision earlier this year in *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), has similarly revealed the Court's willingness to give serious and renewed thought to issues of federalism at the foundation of our constitutional system, and to do so in the context of the enormous expansion of federal criminal law. In that light, a new look by the High Court at the dual sovereignty doctrine and what it means today . . . would surely be welcome."

We respectfully suggest that the Court of Appeals has decided this issue in conflict with *United States v. Lopez*, and that the applicability of *Lopez* to the entire Article I, Section 8, rather than just to Clause 3 thereof, is an important question of federal law which should be settled by this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1586

United States of America,
Appellee,

v.

Forriss D. Elliott,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: February 14, 1996
Filed: July 22, 1996

Before BOWMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BOWMAN, Circuit Judge.

Forriss D. Elliott was convicted of seven counts of mail fraud in violation of 18 U.S.C. § 1341 (1988 & Supp. V 1993) and one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (1988) for submitting fraudulent legal bills to the state of Missouri in connection with his work as a special assistant attorney general. The District Court[1] sentenced him to a term of sixty months of imprisonment. Elliott appeals his conviction and sentence. For reversal, Elliott raises four issues. First, he contends that the mail fraud statute does not apply to purely intrastate mailings. Second, Elliott, who is black, raises an equal-protection challenge to the racial composition of the

[1] The Honorable Jean C. Hamilton, Chief Judge, United States District Court for the Eastern District of Missouri.

all-white jury that convicted him. Third, he claims that the District Court made a number of evidentiary errors. Fourth, he challenges the length of his sentence as calculated under the sentencing guidelines. We affirm Elliott's conviction and sentence.

I.

In the fall of 1989, Elliott, an attorney in private practice in the St. Louis area, was appointed a part-time special assistant attorney general to represent the Second Injury Fund (the Fund) and the State of Missouri in workers' compensation cases where either the Fund or the state was being sued. In limited circumstances, the Fund provides additional compensation to previously compensated employees who suffer a second job-related injury. The goal of the Fund is to encourage employers to hire the partially disabled by limiting the employer's liability in the event that the employee "receives a subsequent compensable injury resulting in additional permanent partial disability." Mo. Rev. Stat. § 287.220.1 (1994). As a special assistant attorney general, Elliott was authorized to bill the state for legal services rendered and expenses incurred in his work on behalf of the state. Elliott mailed his bills to the state on a monthly basis. The bills he submitted, however, turned out to be grossly inflated.

After the state discovered the fraudulent billing scheme, Elliott was indicted for mail fraud. He was convicted after a third trial by an all-white jury. The first two trials, both of which had black jury members, resulted in hung juries.[2] At trial, the government presented a mountain of documentary evidence that mapped out Elliott's fraudulent billing scheme. Thirty-six billing entries showed that Elliott or one of his employees worked more than

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[2] After the first two cases ended with hung juries, a third attempt at trial a few weeks later was unsuccessful when a mistrial was declared during the first day of jury selection because reference was made to the fact that Elliott had been tried twice previously.

twenty-four hours a day, sometimes in excess of fifty hours. On forty occasions, Elliott claimed that he or his associate, Steve Lewis, had appeared at a Workers' Compensation Division trial, court hearing, or deposition on behalf of the Fund when, in fact, minute sheets and deposition transcripts revealed that no one from his law firm was present. Elliott also billed the state for settlement negotiations supposedly done on case files that had been closed months or years earlier, some of which Elliott had closed himself. Numerous times the billing entries showed Elliott, who billed himself out at seventy dollars an hour, as the person doing the legal work when, in fact, the work was done by his paralegal or his associate, both of whom had lower billable rates. The documents indicated that, on many occasions, instead of billing the thirty-dollar flat fee that is allowed for handling a partial disability case, Elliott billed partial disability cases at the much more lucrative hourly rate reserved for total disability cases. The documentary evidence also demonstrated that Elliott had grossly exaggerated copying and postage expenses.

Although the substantial documentary evidence was probably enough to convict Elliott, the government also presented witness testimony that showed Elliott was the mastermind of the fraudulent billing scheme. While representing the Fund, Elliott employed two paralegals at different times to assist him in preparing the bills that he sent to the state. Elliott first hired Brenda Leake in August 1990. Leake testified that Elliott ordered her to make bogus entries on his billing statements. She worked for Elliott for about twelve months until she was fired in September 1991. Elliott then hired Connie O'Bryant as a new paralegal to assist in bill preparation. Even though O'Bryant was called as a defense witness, she acknowledged that Elliott gave her false entries to put in the bills. Mary Reinhardt, who worked for the state and received all the bills, also testified. She stated that while Leake was still employed by Elliott, Leake telephoned her to warn her about the false entries and recommended that someone look at

the inflated bills. Elliott's former accountant, Brian Cox, also testified. In December 1992, after Elliott saw his picture splashed across the front page of the Sunday edition of the *St. Louis Post-Dispatch* accompanied by a story accusing him of billing fifty-hour work days, Elliott telephoned Cox. Elliott asked Cox to review his billing statements. Cox spent two weeks comparing the bills with Elliott's case files. Cox testified that the bills could not be substantiated. Finally, the government put on the previous sworn testimony of Elliott himself. Although denying criminal culpability, Elliott admitted certain bills were "inflated" or false and that the state was billed for work not done. Trial Trans. (Dec. 1, 1994) at 23-25 (testimony of court reporter regarding Elliott's sworn statements).

II.

Elliott first argues that the mail fraud statute, 18 U.S.C. § 1341, does not apply to purely intrastate mailings. Although the evidence shows that Elliott used the United States mails to send his bills to the state, all were sent and received in Missouri. Relying on *United States v. Lopez*, 115 S.Ct. 1624 (1995), Elliott insists that mail fraud requires some sort of interstate connection. We disagree. *Lopez* is a Commerce Clause case and therefore has no application whatsoever to the mail fraud statute, which is based on the Postal Power found in Article I, Section 8, Clause 7 of the Constitution. The Postal Power, of course, gives the federal government the power to deliver mail intrastate. In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990, which made it a federal offense for any individual knowingly to possess a firearm in a school zone. Congress had used the Commerce Clause as the source of its authority to enact the Gun-Free School Zones Act. The *Lopez* Court determined that Congress exceeded its Commerce Clause authority when it passed the Gun-Free School Zones Act because the mere possession of a gun in a school zone did not substantially affect interstate commerce. Unlike the Gun-Free

School Zones Act, the jurisdictional basis of the mail fraud statute is grounded in the Postal Power and therefore necessarily encompasses all items passing through the United States mails, even if their passage is purely intrastate. "It is irrelevant that all of the mailings in this case may have been intrastate in nature," *United States v. Cady*, 567 F.2d 771, 776 n.7 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978), because "[t]he focus of the statute is upon the misuse of the Postal Service . . . and Congress clearly has the authority to regulate such misuse of the mails," *United States v. States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). *See also United States v. Minkin*, 504 F.2d 350, 353 (8th Cir. 1974) (affirming mail fraud conviction where fraudulent mailing made only twelve-mile intrastate journey), *cert. denied*, 420 U.S. 926 (1975); *United States v. Mirabile*, 503 F.2d 1065, 1067 (8th Cir. 1974) (affirming mail fraud conviction for intrastate mailing), *cert.* denied, 420 U.S. 973 (1975).

III.

Elliott next challenges the racial composition of the all-white jury that convicted him as a Fifth Amendment equal-protection violation.[3] He theorizes that the prosecutor, having been stymied by hung racially mixed juries in the first two trials, sought to exclude all potential black jury members from the third trial in the hope of ensuring a conviction. The court seated an all-white jury after the prosecutor eliminated three potential black jurors using challenges for cause and struck another three potential black jurors using peremptory challenges. Elliott argues that the for-cause strikes as well as the peremptory challenges run afoul of *Batson v. Kentucky,* in which the Supreme Court held "the

[3] The judicially engrafted equal-protection component of the Fifth Amendment is implicated in this case because Elliott is challenging the actions of a federal prosecutor. *See United States v. Greene*, 995 F.2d 793, 795 (8th Cir. 1993) ("An action that violates the fourteenth amendment guarantee of equal protection when committed by a state actor violates the due process guarantee of the fifth amendment when committed by a federal actor.").

Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant." 476 U.S. 79, 889 (1986).[4]

We turn first to Elliott's argument that the prosecutor's use of for-cause strikes against three black venire members was a *Batson* violation. He insists that with only six peremptory challenges (plus one for alternate jurors), the prosecutor realized that "he would not be able to strike some black venirepersons for cause." Appellant's Brief at 19. Consequently, Elliott contends that the for-cause strikes in combination with the peremptory strikes resulted in a constitutional violation that deprived him of a fair trial. We disagree. *Batson* applies only to peremptory strikes. We know of no case that has extrapolated the *Batson* framework to for-cause strikes. There is simply no legal basis for this argument, which fails to recognize that peremptory strikes, for which no reasons need be given (absent a *Batson* challenge), are different from challenges for cause, which by definition require a showing of cause. A district court is required to strike for cause any juror who is shown to lack impartiality or the appearance of impartiality and, "[a]bsent abuse of discretion, we will not interfere with the District Court's determination of juror qualifications." *United States v. Tibesar*, 894 F.2d 317, 319 (8th Cir.), *cert. denied*, 498 U.S. 825 (1990). The District Court is given broad discretion in determining whether to strike jurors for

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[4] There is nothing in the record to indicate which jurors, black or white, were voting against the conviction in the first two trials. Elliott's theory assumes that one or more black jury members voted to acquit. Such an assumption is unwarranted. Just as it is wrong for a prosecutor to exclude potential black jurors on the assumption that they will be unable impartially to consider the state's case against a black defendant, so it is equally wrong for Elliott to assume that it was black members of the jury who caused the first two mistrials.

cause because it is in the best position to assess the demeanor and credibility of the prospective jurors. *United States v. Graves*, 5 F.3d 1546, 1554 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1829 (1994). After carefully reviewing the record, we are convinced that the District Court did not abuse its discretion when it dismissed three of the prospective black jurors for cause.

We come, then, to Elliott's arguments concerning the peremptory challenges. The *Batson* framework, using a three-stage burden-shifting analysis, establishes the order and allocation of proof in challenges to the discriminatory use of peremptory strikes in jury selection. *Purkett v. Elem*, 115 S. Ct. 1769, 1770-71 (1995) (per curiam). In the context of a criminal trial, after the defendant makes a prima facie case of purposeful discrimination in the government's use of a peremptory challenge, the burden shifts to the government to offer a race-neutral explanation for the strike. *Id.* A prosecutor's explanation for a strike is deemed race-neutral if discriminatory intent is not inherent in the stated reason. *Id.* at 1771. The defendant may then attempt to prove that the facially valid reason is a mere pretext and that the real reason for the strike was discrimination. *Id.* at 1771. The defendant retains at all times the ultimate burden of persuasion, *id.* at 1771, and the trial court's finding on the discrimination issue will be set aside only if clearly erroneous, *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 (1996) *and* 64 U.S.L.W. 3855 (U.S. June 24, 1996). On appeal, we are mindful of the fact that "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion) (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). After carefully reviewing the trial transcript, we are persuaded that the District Court did not commit clear error in finding that Elliott failed to prove that the government's race-neutral reasons were mere pretextual covers for unlawful discrimination.

The prosecutor used peremptory challenges to strike three black jurors: Juror No. 4 (Smith), Juror No. 12 (Johnson), and Juror No. 20 (Harper). After Elliott objected to the use of these peremptory challenges as a violation of *Batson*, the District Court found that Elliott had established a prima facie case of discrimination. This finding required the prosecutor to come forward with race-neutral explanations for the striking of the jurors.

As an initial matter, we conclude that Elliott's *Batson* challenge with respect to Harper is procedurally barred. At trial, Elliott's counsel initially objected to Harper being stricken as a *Batson* violation, but then withdrew the objection after the government proffered a race-neutral explanation for the strike. *See* Trial Trans. (Nov. 28, 1994) at 218-220A. Elliott cannot raise an argument on appeal that he explicitly waived at trial. Accordingly, only the propriety of the strikes against jurors Smith and Johnson are properly before us.

The prosecutor proffered three race-neutral reasons for striking Smith. First, Smith listed "church organization" under the category of "Hobbies and Activities" on the juror survey form. Smith's church activity concerned the prosecutor because Elliott's first trial resulted in a hung jury when one of the jurors had religious convictions that created problems for him in deliberations. Moreover, the prosecutor also observed that Elliott was reading a Bible during voir dire. The only other juror who listed "church" as an activity was a white female, and she also was struck by the prosecution. Second, Smith was struck because she did not own her own home, which the prosecutor believed meant that Smith "had less of a stake in and commitment to the community." Appellee's Brief at 17. The government also struck any other prospective panel members who did not own their own homes, which included one white and another black. Third, Smith was laughing with defense counsel during voir dire, and was showing particular interest in his comments, which, as the

prosecutor saw it, meant that Smith had developed "more of a bond with defense attorney than the government was comfortable with." Trial Trans. (Nov. 28, 1994) at 214.

Four race-neutral reasons were proffered for striking Johnson. First, Johnson did not own her own home, and as already explained, all potential jurors, white or black, who did not own their own homes were struck. Second, Johnson had relatives employed by the United States Postal Service. Postal employees are often subjected to rigorous scrutiny and secret observation by postal inspectors. Because Elliott was charged with mail fraud, the government's case agent and key witness was a postal inspector. The prosecutor felt that postal employees and their relatives may have negative attitudes toward postal inspectors because of their watchdog role. To avoid this dilemma, all prospective jurors with relatives currently employed by the United States Postal Service were struck, which included a white venireperson who had a relative in the postal service. Third, Johnson failed to respond to certain voir dire questions. When the venirepersons were asked whether they thought the criminal justice system was fair, Johnson failed to raise her hand. When asked whether they thought the criminal justice system was unfair, Johnson again failed to raise her hand. When asked if they had no opinion on the fairness of the criminal justice system, Johnson failed to raise her hand for a third time. The prosecutor struck Johnson for her unresponsiveness. Finally, the prosecutor also felt that Johnson "was looking at him in hostile fashion." Appellee's Brief at 18.

Once the prosecution articulated race-neutral reasons for the peremptory challenges, the burden then shifted to Elliott to offer evidence showing that the reasons given by the government —

all conceded by Elliott to be facially race-neutral[5] — were a mere pretext for discrimination and that the real reason Smith and Johnson were struck was because they were black. Although Elliott's appellate counsel makes a valiant attempt to show that all of the government's proffered reasons were pretextual, Elliott's trial counsel failed to attack as pretextual several of the race-neutral reasons proffered by the government to justify the strikes. At trial, Elliott did not challenge as pretextual the striking of Smith because of her church activity; he also did not challenge as pretextual the striking of Johnson because she had relatives in the postal service. We uphold facially neutral reasons where the opponent of the strike makes no attempt in the trial court to demonstrate pretext. *Williams v. Groose*, 77 F.3d 259, 261 (8th Cir. 1996); *see also United States v. Carr*, 67 F.3d 171, 176 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1285 (1996).

Although Elliott did attempt to show that the remaining reasons — lack of community attachment, unresponsiveness during voir dire, and hostility toward one party or undue friendliness with one party — were a mere pretext for discrimination, he did so only in the most conclusory fashion. Consequently, the District Court found that Elliott failed to satisfy his ultimate burden of proving purposeful discrimination. The District Court was in the best position to evaluate the motives of the prosecutor, and the record reveals that the court did so meticulously, pains-

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[5] Our caselaw establishes that explanations of the sort offered by the prosecutor in this case are race-neutral. *See, e.g., Williams v. Groose*, 77 F.3d 259, 261 (8th Cir. 1996) (postal workers); *United States v. Carr*, 67 F.3d 171, 175-76 (8th Cir. 1995) (rented home indicating lack of community attachment), *cert. denied*, 116 S. Ct. 1285 (1996); *United States v. Atkins*, 25 F.3d 1401, 1406 (8th Cir.) (insufficient attachment to community), *cert. denied*, 115 S. Ct. 371 (1994); *United States v. Todd*, 963 F.2d 207, 211 (8th Cir. 1992) (hostility toward prosecutor); *United States v. Day*, 949 F.2d 973, 979 (8th Cir. 1991) (sporadic work history and lack of property ownership, indicating lack of community attachment); *United States v. Jackson*, 914 F.2d 1050, 1052-53 (8th Cir. 1990) (insufficient commitment to community).

takingly noting the several racially neutral reasons offered for the challenges and finding that those reasons were not pretextual. We cannot say that the court clearly erred in making its finding of no discrimination.

In a last-ditch effort to show a *Batson* violation, Elliott makes a "similarly situated" argument for the first time on appeal. He notes that while Smith was struck because of her church activity, the prosecutor failed to strike several similarly situated white jurors. Specifically, the prosecutor kept a white juror who worked for a Baptist church school and whose husband had been a minister for six years, a white juror who listed "Christian concerts" as a hobby, and a white juror who indicated that he "preach[ed] parttime" as an activity. Similarly, Elliott points out that while Johnson was struck because, among other reasons, she had postal service relatives, the prosecutor did not challenge a white juror who had "a very close friend who is a retired mail man," a white juror whose uncle was a retired letter carrier, and a white juror whose grandmother was a postmaster and whose brother "is a postmaster in a small town."

Elliott is correct that "the government may not justify peremptory challenges to venire members of one race unless venire members of another race with comparable or similar characteristics, are also challenged." *Reynolds v. Benefield*, 931 F.2d 506, 512 (8th Cir.) (civil case), *cert. denied*, 501 U.S. 1204 (1991). The government must exercise "its challenges in a consistent manner," *United States v. Atkins*, 25 F.3d 1401, 1406 (8th Cir.), *cert. denied*, 115 S. Ct. 371 (1994), and treat similarly situated jurors similarly, *Davidson v. Harris*, 30 F.3d 963, 965 (8th Cir. 1994) (civil case) (noting otherwise neutral explanation for removal of black juror may be pretextual if stated reason also applies to white juror who is not removed), *cert. denied*, 115 S. Ct. 737 (1995). Elliott thus may have had a factual basis for at least a colorable *Batson* claim based on the government's failure to strike white jurors who arguably were similarly situated to the

black jurors who were struck. This argument, however, is untimely since it is made for the first time on appeal. *See United States v. Dobynes*, 905 F.2d 1192, 1196-97 (8th Cir.), *cert. denied*, 498 U.S. 877 (1990). Having failed to raise this argument before the trial court, Elliott has waived his right to have it considered by this Court. *See Roth v. G.D. Searle & Co.*, 27 F.3d 1303, 1307 (8th Cir. 1994).

We hold that the District Court did not err in rejecting Elliott's *Batson* claims.

IV.

Elliott also argues that the District Court made several evidentiary errors when it: (1) limited cross-examination of Brenda Leake, his former paralegal; (2) excluded as irrelevant evidence concerning the routine practices of the Office of the Missouri Attorney General and other special assistant attorneys general; and (3) excluded as irrelevant evidence relating to the routine practices of the Workers' Compensation Division. "We review the evidentiary rulings of a district court only for abuses of discretion, and will reverse only when an improper evidentiary ruling affects the substantial rights of the defendant or when we believe that the error has had more than a slight influence on the verdict." *United States v. Ballew*, 40 F.3d 936, 941 (8th Cir. 1994) (citations omitted), *cert. denied*, 115 S. Ct. 1813 (1995).

A. Cross-Examination of Brenda Leake

Elliott maintains that Leake misrepresented her educational and employment history on her resume, which he relied on when he hired her as a paralegal. He claims that these misrepresentations were relevant to his defense because Leake's "lack of education and experience caused mistakes and erroneous billings." Appellant's Brief at 43. According to Elliott, the jury was entitled to know about Leake's supposed lies because it was these lies that "lulled" Elliott "into believing that she was capable of relieving him of much of the work generated by the

thousands of files." *Id.* Armed with this information, Elliott contends that the jury would have believed his cries of innocence and chalked up the over-billings to Leake's mistakes.

Elliott sought to introduce several documentary exhibits, including Leake's resume, to show that Leake misrepresented her educational and work experience. He wanted to use these exhibits to impeach Leake on cross-examination. Trial Trans. (Nov. 30, 1994) at 22. Elliott was not allowed to use the documentary exhibits, however, because the trial court granted the government's motion in limine to exclude the exhibits as extrinsic evidence of Leake's conduct. Federal Rule of Evidence 608(b) prohibits the use of extrinsic evidence to prove specific instances of a witness's conduct. *United States v. Johnson*, 968 F.2d 765, 766 (8th Cir.), *cert. denied*, 506 U.S. 980 (1992). Consequently, "[w]hile documents may be admissible on cross-examination to prove a material fact, or bias, they are not admissible under Rule 608(b) merely to show a witness' general character for truthfulness or untruthfulness." *United States v. Martz*, 964 F.2d 787, 789 (8th Cir.) (citations omitted), *cert. denied*, 506 U.S. 1038 (1992). The reason for barring extrinsic evidence "is to avoid holding mini-trials on peripherally related or irrelevant matters." *Id.* "To the extent that such evidence is ever admissible, the introduction of extrinsic evidence to attack credibility is subject to the discretion of the trial court." *Johnson*, 968 F.2d at 766. Given Rule 608(b)'s admonition against the introduction of such evidence, we conclude that the District Court did not abuse its discretion when it excluded the exhibits as extrinsic evidence.

We note that Elliott fails to mention Rule 608(b) in his opening brief, relying instead on the general principle that criminal defendants are entitled to a "searching cross-examination." Appellant's Brief at 41. That is exactly what Elliott got. Although the trial court excluded the extrinsic evidence, it did not place any specific limitations on areas of cross-examination.

Elliott was given a wide berth to engage in a searching and wide-ranging cross-examination as long as it did not require the use of extrinsic evidence. Elliott was thus required to "take his answer" because Rule 608(b) precludes him from using extrinsic evidence to impeach the witness. *United States v. Capozzi*, 883 F.2d 608, 615 (8th Cir. 1989) (citations to quoted cases omitted), *cert. denied*, 495 U.S. 918 (1990).

Despite the District Court's generous latitude with respect to cross-examination questions, Elliott contends that the government's motion in limine sought "to bar defendant from using documents *and* cross-examining [Leake] as to misrepresentations concerning her educational background and her job history." Appellant's Brief at 38 (emphasis added). Elliott is mistaken. The court specifically informed defense counsel that he could ask Leake questions about her education and work experience. Trial Trans. (Nov. 30, 1994) at 20-21. The court simply requested that, prior to those questions being asked, defense counsel approach the bench and proffer the question to allow the court to make a ruling. *Id.* (Nov. 29, 1994) at 15-16; *id.* (Nov. 30, 1994) at 9-10, 22-23. There were no questions proffered by the defense that the court did not allow, and Elliott was free to ask Leake anything he wished concerning misrepresentations by her as to her education and employment. We are unable to see any abuse of discretion in the District Court's handling of this matter.

B. Routine Practices of the Attorney General's Office and Other Special Assistant Attorneys General

Elliott sought to introduce evidence relating to the routine practices of the Office of the Missouri Attorney General and other special assistants because he "wanted-to show that mistakes were common in the manner in which [the bills] were handled by the Attorney General's Office and in the manner in which files were routinely reviewed on a monthly basis by Special Assistants." Appellant's Brief at 45 (citations omitted).

The routine practices ostensibly would have been established by the proffered testimony of two other special assistant attorneys general. The special assistants would have testified that (1) special assistants were told to use their own best judgment when determining whether to categorize a file as a partial or total disability case, and (2) they had received closed files without being told that the files were closed and were paid for work done on the closed files. The District Court excluded this evidence as irrelevant. *See* Fed. R. Evid. 402 (stating irrelevant evidence is inadmissible). After carefully reviewing the record, we conclude that the District Court properly excluded this evidence as irrelevant.

The issue at trial was whether Elliott intentionally defrauded the state by knowingly submitting false bills. The proffered testimony concerning the categorization of files or the fact that other special assistants were paid for work done on closed files had nothing to do with this issue. On cross-examination, one of the proffered witnesses admitted that he had no personal knowledge of how Elliott prepared his legal bills, kept his time, dealt with the courts, or reviewed his files. The proffered witness could only testify as to how he prepared his own legal bills and handled cases in which he was involved. Put simply, the proffered testimony had nothing to do with Elliott and was irrelevant to the question of his guilt or innocence. The District Court did not abuse its discretion in excluding this evidence.[6]

C. Routine Practice of the Workers' Compensation Division

Elliott also sought to introduce testimony concerning routine practice at the Workers' Compensation Division. The purpose of

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[6] Because the evidence was irrelevant to any issue in the case, we need not and do not discuss Elliott's arguments based on Federal Rule of Evidence 406 (evidence of habit or routine practice). These arguments are meritless in any event.

the proffered testimony was to show that court proceedings at the Compensation Division were rather informal and that the absence of a name on a minute sheet did not necessarily mean that the special assistant was absent from the proceeding. Although the District Court excluded this evidence as being irrelevant, the evidence may have had some relevance because the government's case included proof that Elliott billed the state for court appearances at the Compensation Division despite the fact that minute sheets failed to name him as being present. Elliott argues that the evidence was admissible for a purpose envisioned by Federal Rule of Evidence 406 — *i.e.*, to show that the Compensation Division was acting in accordance with its usual laxness when it failed to register on the minute sheets all attorneys in attendance for the proceedings. We are not convinced that the proffered testimony established that the allegedly slack practices at the Compensation Division were sufficiently numerous or regular to rise to the level of cognizance under Rule 406 as a routine practice. But even assuming that the laxness did constitute a routine practice, if the District Court abused its discretion in excluding this testimony the error amounted to, at most, only harmless error given the weight of the government's massive case against Elliott. *See United States v. Mihm*, 13 F.3d 1200, 1205 (8th Cir. 1994); *United States v. DeAngelo*, 13 F.3d 1228, 1233 (8th Cir.), *cert. denied*, 114 S. Ct. 2717 (1994).

V.

Elliott challenges the length of his sentence as calculated under the sentencing guidelines. Mail fraud carries a base-offense level of 6, U.S.S.G. § 2F1.1(a) (1995), which, with Elliott's criminal history category of I, would provide a sentencing range of imprisonment of zero to six months. Through a series of enhancements recommended by the presentence report (PSR), the base-offense level was raised to 24. The enhancements Elliott received were (1) an eight-level increase pursuant to *id.* § 2F1.1(b)(1)(1) because the "amount of loss" to the state

exceeded $200,000; (2) a two-level increase pursuant to *id.* § 3C1.1 because Elliott obstructed the administration of justice by asking his paralegal to lie and by lying on the witness stand himself; (3) a two-level increase pursuant to *id.* 2Fl.l(b)(2)(A) for "more than minimal planning"; (4) a four-level increase pursuant to *id.* § 3Bl.l(a) for his extensive "role in the offense"; and (5) a two-level increase pursuant to *id.* § 3B1.3 for his abuse of a position of public trust in his capacity as a special assistant attorney general. As a result of these enhancements, Elliott received a sentence of sixty months of imprisonment. Elliott claims the District Court erred in accepting the enhancements contained in the PSR because the court failed to make "a finding as to the allegations in the PSR which were disputed by appellant." Appellant's Brief at 51. "We review the factual findings a district court makes in sentencing for clear error, and the application of the guidelines to the facts de novo." *Darden*, 70 F.3d at 1544. We conclude that the District Court did not commit any error in making its sentencing determination.

Where the defendant objects to statements in the PSR, a district court should neither merely accept the PSR nor require the defendant to disprove the disputed facts. *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 989 (1993). Instead, the government bears the burden of proving any disputed enhancement factors. *United States v. Hammer*, 3 F.3d 266, 272 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1121 (1994). Elliott complains that the government did not satisfy its burden with respect to the enhancements because the trial court did not hold an evidentiary hearing before sentencing. "A formal sentencing hearing is not, however, the exclusive means by which the government may meet [its evidentiary burden]." *United States v. Bellrichard*, 62 F.3d 1046, 1051 (8th Cir. 1995) (quoting *United States v. Fetlow*, 21 F.3d 243, 250 (8th Cir.), *cert. denied*, 115 S. Ct. 456 (1994)) (alteration in *Bellrichard*), *cert. denied*, 116 S. Ct. 1425 (1996). In fact, a district court may base its findings on evidence presented at trial

"even though no additional exhibits or testimony are introduced at the sentencing phase." *Id.* (quoting *Fetlow*). That is what the District Court did in this case. For each of the enhancements that Elliott challenges on appeal, the District Court properly based its findings on evidence adduced at trial. *See* Trial Trans. (Mar. 3, 1995) at 11 (amount of loss); *id.* at 18 (obstruction of justice)[7]; *id.* at 21 (more than minimal planning); *id.* at 26 (role in the offense); *id.* at 28-29 (abuse of position of trust). The District Court methodically considered the required grounds for each enhancement and carefully based its factual findings on the evidence. We cannot say that any of these factual findings are clearly erroneous.

Finally, Elliott claims that he was entitled to a downward departure because other defendants snared in the Second Injury Fund investigation received far lesser sentences. Elliott sought access to the sealed PSRs of these other defendants to bolster his argument for a downward departure, but his request was denied by the District Court. "A district court's failure to grant a defendant a downward departure is not reviewable on appeal if the court was aware of its authority to grant a departure."

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[7] As noted above, the government provided the sentencing court with two independent grounds to support the obstruction of justice enhancement. First, the government claimed that Elliott asked his paralegal to lie. During the first trial, Brian Cox testified that Connie O'Bryant, the paralegal, told him in Elliott's presence that Elliott directed her to lie. Second, the government argued that Elliott himself lied on the witness stand. The District Court accepted both of these grounds as a basis for the enhancement. On appeal, Elliott complains that the District Court improperly used Cox's testimony from the first trial — which resulted in a hung jury — to enhance his sentence. He argues that it is "wrong to rely on testimony in an earlier trial in which the issue was certainly disputed and the jury did not convict appellant." Reply Brief at 6. We need not and do not decide whether it was improper for the sentencing court to rely on Cox's earlier testimony from the first trial because the court's finding that Elliott himself lied on the witness stand provides an independent and sufficient basis for enhancement.

Darden, 70 F.3d at 1549. Elliott claims that "there is nothing in the record to reflect the Court's awareness of the authority to depart, because the District Court said nothing at all with reference to a departure or authority to depart." Reply Brief at 6. Elliott is simply wrong. The record reveals that the court was in fact well aware of its authority to grant a departure and opted not to do so. On at least two occasions during the sentencing hearing, Elliott's counsel pressed the court to consider the lighter sentences of the other Second Injury Fund defendants and to use that as a basis for departing downward in this case. Trial Trans. (Mar. 3, 1995) 4-7; *id.* at 41-42. Aware of its discretionary authority to depart downward, the court exercised its discretion by declining to grant the requested departure. Its decision is not reviewable.

VI.

For the foregoing reasons, the judgment of the of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1586EMSL

United States of America,
Appellee,

v.

Forriss D. Elliott,
Appellant.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 2, 1996

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1586EMSL

United States of America,
Appellee,

v.

Forriss D. Elliott,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Judgment

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 22, 1996

Order Entered in Accordance with Opinion.
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

Article I, Section 8

The Congress shall have Power

To lay and collect Taxes, Duties, imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; -- And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Amendment V

No person . . . ; . . . nor be deprived of life, liberty, or property, without due process of law; . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . .

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE UNITED STATES

Title 18, United States Code, Section 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.